CHAPTER 16

INTERNATIONAL AGREEMENTS AND SOFAS

REFERENCES

1. Case-Zablocki Act, Pub.L. 92-403, 1 U.S.C. § 112b.
2. 22 C.F.R Part 181, *Coordination, Reporting, and Publication of International Agreements*.
3. State Department Circular 175 (Volume 11, Foreign Affairs Manual, Chapter 720).
4. DoDD 5530.3, *International Agreements*, 11 Jun 87 (CH. 1, 18 Feb 91).
5. CJCSI 2300.01, *International Agreements*, 15 Sep 94 (CH. 1, 19 Aug 96).
6. AR 550-51, *International Agreements*, 15 Apr 98.
7. AFI 51-701, *Negotiating, Concluding, Reporting, and Maintaining International Agreements*, 6 May 94.
8. SECNAVINST 5710.25A, *International Agreements*, 2 Feb 95.
9. DoDD 5525.1, *Status of Forces Policy and Information*, 7 Aug 79.
10. AR 27-50/SECNAVINST 5820.4G, *Status of Forces Policies, Procedures, and Information*, 14 Jan 90.
11. AFI 51-703, *Foreign Criminal Jurisdiction*, 6 May 94.
12. DoDD 5525.3, *Jurisdiction of Service Courts of Friendly Foreign Forces in the United States*, 18 Aug 66.
13. AR 27-51, *Jurisdiction of Service Courts of Friendly Foreign Forces in the United States*, 15 Dec 75.
14. AFI 51-705, *Jurisdiction of Service Courts of Friendly Foreign Forces in the United States*, 31 Mar 94.
15. SECNAVINST 5710.21, *Jurisdiction of Service Courts of Friendly Foreign Forces in the United States*, 13 Apr 67.

INTRODUCTION

This chapter does not attempt to discuss specific international agreements that may affect military operations. They are too numerous, and too many are classified. Instead, this discussion focuses the role of the judge advocate in this area. The operational judge advocate may be faced with the following tasks relating to international agreements and SOFAs:

Determining the existence of an agreement.

Negotiating an agreement.

Implementing/ensuring compliance with the agreement.

DETERMINING THE EXISTENCE OF AN AGREEMENT

Determining the existence of an international agreement is more challenging than one might think. Except for the most well known agreements (such as the various NATO agreements), most agreements are obscure, poorly publicized, and occasionally classified. A judge advocate supporting a unit that is deploying often has to conduct an extensive search to determine whether an agreement exists, and then must try to find the text of the agreement. The following sources may help.

The U.S. Department of State is the repository for all international agreements to which the United States is a party (1 U.S.C. § 112a). The Department publishes annually a document entitled *Treaties in Force* (TIF), containing a list of all treaties and other international agreements in force as of 1 January of that year. The most

current TIF is available at the web site of the Office of the Legal Advisor, Treaty Affairs, http://www.state.gov/www/global/legal_affairs/tifindex.html. It is available in printed form from the Government Printing Office (http://bookstore.gpo.gov/), and may be found in some of the larger staff judge advocate offices and most libraries. Note, however, that TIF is merely a list of treaties and agreements, with the appropriate citation.[1] TIF does not include the text of the agreement; the practitioner must find it based on the citation. Many agreements in TIF have no citations, because they have not yet been published in one of the treaty series (which are often years behind), or are cited as "NP," indicating that they will not be published. Classified agreements are not included in TIAS. So, although TIF is a good place to start, it is not the total solution.

There are a number of sources to turn to next. Sticking with the State Department, it may be useful to contact the Country Desk responsible for the country to which you are deploying. A complete list of phone numbers for each Country Desk can be found at http://www.state.gov/www/regions/country_offices.html. As these desks are located in Washington, they should be easily accessible. Somewhat less accessible, but equally knowledgeable, is the Military Group for the country. A listing for these overseas phone numbers can be found at http://www.state.gov/www/about_state/contacts/key_officers99/index.html. Either the Country Desk or the Military Group should have the most current information about any agreements with "their" country.

Within DoD, the judge advocate has a number of options. First, start with your operational chain of command, ending with the Combatant Commander's legal staff. Some combatant commands list the agreements with countries within their area of responsibility on their web sites, though it is more likely that they will do so on their classified (SIPRNET) site. The next option could be the Service international and operational law divisions: Army (DAJA-IO) (703) 588-0143, DSN 225; Air Force (JAI) (703) 695-9631, DSN 225; Navy/Marine Corps (Code 10) (703) 697-9161, DSN 225.

The Center for Law and Military Operations (CLAMO) maintains a list of Status of Forces Agreements (SOFAs), with text, at http://www.jagcenet.army.mil. Other agreements may be found elsewhere on the Internet. For example, NATO agreements can be found at the NATO site (http://www.nato.int).

NEOGTIATING AN INTERNATIONAL AGREEMENT

Although a judge advocate may be involved in the negotiation of an international agreement, it is unlikely that he will be doing so in such an austere environment that this handbook will be the only reference available. Accordingly, this discussion will be rather summary. However, this section is still very important for the following reasons:

- It is important to know what constitutes an international agreement so that you avoid inadvertently entering into one. This applies not only to the judge advocate, but to the commander and staff as well.

- It is important to know that this is an area governed by very detailed rules that require significant interagency coordination. It is not a process to be entered into lightly, but at the same time, it does work.

There are two significant concepts related to negotiating and concluding international agreements: approval and coordination.

Approval. The elements of an international agreement are (1) an agreement (2) between governments (or agencies, instrumentalities or political subdivisions thereof) or international organizations (3) signifying an intent to be bound under international law. In many respects, an international agreement is simply a contract. If a document includes the elements listed above, it is an international agreement, and its title or form is of little consequence. It is also possible that an agreement may be oral. Similarly, the actual status or position of the signer is not as important as the representation that he speaks for his government. The judge advocate should be suspicious of any document that begins, "The Parties agree . . ." unless appropriate delegation of authority to negotiate and conclude is apparent.

[1] The citation may be to United States Treaties (U.S.T.) series; Treaties and Other International Agreements (TIAS) series; and/or United Nations Treaty Series (U.N.T.S.).

An international agreement may be styled a memorandum of understanding or memorandum of agreement, exchange of letters, exchange of diplomatic notes ("Dip Notes"), technical arrangement, protocol, *note verbale* or *aide memoire*. Forms that usually are not regarded as international agreements include contracts made under the FAR, credit arrangements, standardization agreements (STANAGs), leases, procedural arrangements and FMS letters of offer and acceptance. There are exceptions, however. A memorandum that merely sets out standard operating procedures for de-conflicting radio frequencies is not an international agreement, while a "lease" that includes status provisions would rise to the level of an international agreement. The point is, form is not as important as substance.

An international agreement binds the United States in international law. The President has certain Constitutional powers in this area. Similarly, Congress has certain Constitutional powers that permit it to authorize and regulate international agreements. Military units, on their own, have no such power; accordingly, any power it has is derivative of the President's executive power or of a Congressionally created law. In other words, there must be a specific grant of authority to enter into an international agreement.

Most agreement with which judge advocates will be interested are implementing powers possessed by the Secretary of Defense. For example, 22 U.S.C. § 2770a, Exchange of Training and Reciprocal Support, provides "… the President may provide training and related support to military and civilian defense personnel of a friendly foreign country or an international organization…" and goes on to require an international agreement to implement the support. In Executive Order 11501, the President delegated his authority to the Secretary of Defense. 10 U.S.C. § 2342, Cross-servicing Agreements, is more direct, providing "… the Secretary of Defense may enter into an agreement …" to provide logistical support, etc..

In DoDD 5530.3, SECDEF delegated much of his power to enter into international agreements to the Under Secretary of Defense for Policy (USD(P)), and delegated specific powers further. Matters that are predominately the concern of a single Service are delegated to the Service Secretaries. Agreements concerning the operational command of joint forces are delegated to the Chairman, Joint Chiefs of Staff (CJCS). Additional special authorities are delegated to various defense agencies.

In CJCSI 2300.01A, CJCS has delegated much of his authority in this area to the combatant commanders (CINCs). Redelegation to subordinate commanders is permitted—this will be accomplished by CINC regulation. Similarly, the Service Secretaries have published regulations or instructions, noted in the References section, that delegate some portion of the Secretaries' authority.

The most important authority which has <u>not</u> been delegated (that is, the authority remains at the DoD level) is the authority to negotiate agreements which have "policy significance." The portion of DoDD 5530.3 addressing the subject is as follows:

> 8.4. Notwithstanding delegations of authority made in section 13., below, of this Directive, all proposed international agreements having policy significance shall be approved by the OUSD(P) before any negotiation thereof, and again before they are concluded.
>
> 8.4.1. Agreements "having policy significance" include those agreements that:
>
> 8.4.1.1. Specify national disclosure, technology-sharing or work-sharing arrangements, coproduction of military equipment or offset commitments as part of an agreement for international cooperation in the research, development, test, evaluation, or production of defense articles, services, or technology.
>
> 8.4.1.2. Because of their intrinsic importance or sensitivity, would directly and significantly affect foreign or defense relations between the United States and another government.
>
> 8.4.1.3. By their nature, would require approval, negotiation or signature at the OSD or the diplomatic level.

8.4.1.4. Would create security commitments currently not assumed by the United States in existing mutual security or other defense agreements and arrangements, or which would increase U.S. obligations with respect to the defense of a foreign government or area.

This list in subparagraphs 8.4.1.1. through 8.4.1.4., above, is not inclusive of all types of agreements having policy significance.

All of the directives and regulations that delegate authority contain the caveat that agreements that have political significance are not delegated. They also may contain other limitations of delegation. In general, delegations are to be construed narrowly. Questions about whether an authority has been delegated by a higher authority generally must be referred to that authority for resolution. This is an area where if you have to ask whether you have authority, you probably do not.

The directives provide specific guidance on the procedures to be used when requesting authority to negotiate or conclude an agreement from the appropriate approval authority. Among other requirements, a legal memorandum must accompany the request; therefore, the judge advocate will be closely involved in the process. The legal memorandum must trace the authority to enter into the agreement from the Constitution/statute through all delegations to the approval authority. All approvals must be in writing.

Coordination. In addition to the approval requirements summarized above, Congress has created another level of review in the Case-Zablocki Act. 1 U.S.C. § 112b(c) (reprinted as enclosure 4 to DoDD 5530.3) provides: "Notwithstanding any other provision of law, an international agreement may not be signed or otherwise concluded on behalf of the United States without prior consultation with the Secretary of State." The Secretary of State has published procedures to implement the Case-Zablocki Act in 22 C.F.R. Part 181 (reprinted as enclosure 3 to DoDD 5530.3). Part 181.4 specifically deals with the consultation requirement. It initially refers the reader to Circular 175 procedures (which may be found at http://foia.state.gov/Famdir/fam/11fam/11fam.html), but those procedures are largely digested in the remainder of Part 181.4. Unfortunately, these procedures are not particularly detailed. DoDD 5530.3 is similarly unhelpful, merely assigning the responsibility to coordination with the State Department to the authority to which approval of the agreement has been delegated.

In short, a judge advocate at a unit negotiating an international agreement is going to be unable to effect the Department of State coordination on his own. The proposed agreement will have to rise through the chain of command until it gets to a level at which the proper coordination may be made.

Once the proposed agreement has been approved and coordinated, the actual negotiation with the foreign authorities may begin. At this point, the process is much like negotiating any contract. The objectives of the parties, the relative strengths of their positions, and bargaining skills all play a part. Note that once an agreement is reached, it may not be signed until approval has been given, by the same procedures discussed above, unless the initial approval was to negotiate and conclude the agreement.

Once concluded, there remain procedural requirements. Chief among these is the requirement to send a certified copy of the agreement to the Department of State within 20 days. DoDD 5530.3 requires that another two copies be forwarded to the DoD General Counsel. If concluding an agreement based on delegated authority, the delegating authority also wants a copy. For example, CJCSI 2300.01A requires a copy be forwarded to the Secretary, Joint Staff. Those concluding an agreement based on authority delegated by the Secretary of the Army must forward a copy to HQDA (DAJA-IO). (The Army requires all copies within 10 days.)

IMPLEMENTING/ENSURING COMPLIANCE WITH THE AGREEMENT

Like any other "law," international agreements to which the United States is a party must be followed. The judge advocate will be a principle player in this effort. Some of the areas, such as foreign criminal jurisdiction, will fall within the judge advocate's ambit in any case. Others, such as logistics agreements, will be handled by experts in other staff sections, with judge advocate support. In areas in which we have been exercising an agreement for a long time, such as the NATO Acquisition and Cross-Servicing Agreement (ACSA), the subject-matter experts, such

as the logisticians, will require little or no legal support. Little used agreements, or newly concluded agreements, may require substantial judge advocate involvement.

Common subjects of international agreements include status of forces, logistics support, pre-positioning, cryptological support, personnel exchange programs and defense assistance, including security assistance programs. For the deploying judge advocate, status of forces agreements are probably the most important, followed by logistics support agreements.

Status of Forces Agreements

Status/Foreign Criminal Jurisdiction (FCJ). One of the most important deployment issues is criminal jurisdiction. The general rule of international law is that a sovereign nation has jurisdiction over all persons found within its borders. There can be no derogation of that sovereign right without the consent of the receiving state, and, in the absence of agreement, U.S. personnel are subject to the criminal jurisdiction of the receiving state. On the other hand, the idea of subjecting U.S. personnel to the jurisdiction of a country in whose territory they are present due solely to orders to help defend that country raises serious problems. In recognition of this, and as a result of the Senate's advice and consent to ratification of the NATO SOFA, DoD policy, as stated in DoDD 5525.1, is to maximize the exercise of jurisdiction over U.S. personnel by U.S. authorities.

An exception to the general rule of receiving state jurisdiction is deployment for combat, wherein U.S. forces are generally subject to exclusive U.S. jurisdiction. As the exigencies of combat subside, however, the primary right to exercise criminal jurisdiction may revert to the receiving state.

Status of Forces Agreement. Resolving the issue of FCJ is often the catalyst of a SOFA, so it will be a rare SOFA that does not address it in detail. Article VII of the NATO SOFA provides a scheme of shared jurisdiction among the Receiving State (i.e., the host nation) and the Sending State (i.e., the State sending forces into the host nation). This scheme is the model for many other SOFAs, so it will be discussed in detail. All examples will assume a U.S. soldier stationed in Germany.

Exclusive Jurisdiction in the Sending State. Conduct which constitutes an offense under the law of the Sending State, but not the Receiving State, is tried exclusively by the Sending State. For example, dereliction of duty is an offense under the UCMJ, but not under German law, so exclusive jurisdiction rests with the U.S..

Exclusive Jurisdiction in the Receiving State. Conduct which constitutes an offense under the law of the Receiving State, but not the Sending State, is tried exclusively by the Receiving State. For example, traffic offenses violate German law, but not U.S. law, so Germany has exclusive jurisdiction over the offense.

Concurrent Jurisdiction. For all conduct which constitutes an offense under the laws of both the Receiving and Sending State, there is concurrent jurisdiction, with primary jurisdiction being assigned to one of the parties.

Primary Concurrent Jurisdiction in the Sending State. The Sending State has primary jurisdiction in two instances. First are acts in which the Sending State is the victim or a person from the Sending State (otherwise covered by the SOFA) is the victim. This is known as *inter se* ("among themselves"). For example, if a soldier assaults another soldier, it violates both U.S. and German law, but primary jurisdiction rests with the U.S. because the victim is of the Sending State. Second are acts or omissions which are done in the performance of official duty. For example, a soldier, driving between posts, that hits and kills a pedestrian could be charged with some sort of homicide by both the U.S. and Germany, but because it was committed while in the performance of official duty, primary jurisdiction rests with the U.S..

Primary Concurrent Jurisdiction in the Receiving State. In all other cases, primary jurisdiction rests with the Receiving State. However, it is possible for the Receiving State to waive its primary jurisdiction in favor of the Sending State, and they often do so. The NATO SOFA provides that "sympathetic considerations" shall be given to requests to waive jurisdiction. For example, if a soldier assaults a German national, it violates both U.S. and German law, but Germany has primary jurisdiction. Upon request, Germany may waive its jurisdiction, in which case the soldier may be tried by U.S. court-martial.

Absence of a SOFA. If no SOFA exists, it is still possible for the United States to retain some criminal jurisdiction over our deployed forces.

United Nations missions. Personnel participating in a UN mission will typically have special protection. In some cases, the State to which the UN is deploying forces may grant those forces "expert on mission" status. This refers to Article VI of the Convention on the Privileges and Immunities of the United Nations (reprinted in the Peace Operations chapter), and grants complete criminal immunity. Alternatively, the UN may negotiate a SOFA, though in UN parlance it is called a Status of Mission Agreement (SOMA). The UN "Model" SOMA, which is to be used as a template for the actual SOMA, provides for exclusive criminal jurisdiction in the Sending State.

Administrative and Technical Status. Some Receiving States may consent to granting U.S. personnel the privileges and immunities equivalent to the administrative and technical staff of the U.S. embassy receive. This is often referred to in short-hand manner as "A&T status." In many cases, the U.S. can obtain such status by incorporating, by reference, the privileges and immunities already granted to U.S. military personnel under another agreement, such as a defense assistance agreement that includes personnel assigned to the U.S. embassy or to a Military Assistance Advisory Group (MAAG). These agreements usually provides A&T status to the covered personnel. A&T status is rarely granted for large-scale and/or long-term deployments. The Receiving State typically recognizes the A&T status of the deploying forces through an exchange of diplomatic notes. The Combatant Commander should be able to energize the process that results in these notes. Alternatively, the MAAG may be able to do so.

Visiting Forces Acts. If the U.S. does not have an agreement with a host nation, some nations still extend protections to visiting forces in domestic statutes commonly called a Visiting Forces Act. The Commonwealth nations are those nations most likely to have a Visiting Forces Act (i.e. Jamaica, Belize). In general, these statutes provide a two part test. First, Visiting Forces Acts require that the nation sending forces to the host country be listed in accordance with its domestic law. Second, the jurisdictional methodology is one of two types: a jurisdictional model similar to the NATO SOFA or protections equivalent to A&T status. In any case, it is essential that the judge advocate acquire a copy of the host nation's Visiting Forces Act before deploying into that country.

No Protection. The last situation encountered by deployed units occurs when U.S. forces enter a host nation totally subject to the host nation's law. While it is generally U.S. policy not to do this, there are some situations where a political decision is made to send U.S. forces into a country without any jurisdictional protections. U.S. forces are essentially tourists. Quite often, however, liaison with the host nation military authorities that invited us into the country may be successful in securing more favorable treatment should the need arise.

Exercise of FCJ by the Receiving State. Under any of these cases, if U.S. military personnel are subjected to foreign criminal jurisdiction, the United States must take steps to ensure that they receive a fair trial. Detailed provisions are set out in DoDD 5525.1 and implementing Service regulations.

Claims. Claims for damages almost always follow deployments of U.S. forces. Absent agreement to the contrary (or a combat claims exclusion), the U.S. is normally obligated to pay for damages caused by its forces. As a general rule, the desirable arrangement is for state parties to waive claims against each other. Since the Receiving State benefits from hosting a combined exercise with U.S. forces or from some other form of U.S. presence, it is not uncommon for a Receiving State to agree to pay third party claims caused by U.S. forces in the performance of official duty. As a result, the U.S. is liable only for third party claims caused other than in the performance of official duties. In such a case, the desirable language is that the United States may, at its discretion, handle and pay such claims in accordance with U.S. laws and regulations, *i.e.,* the Foreign Claims Act.[2]

Force Protection/Use of Deadly Force. The general rule of international law is that a sovereign is responsible for the security of persons within its territory. This does not, however, relieve the U.S. commander of his responsibility for the safety (*i.e.,* self-defense) of his unit. As part of the predeployment preparation, the judge advocate should determine whether the applicable agreement includes provisions regarding force security. While

[2] 10 U.S.C. § 2734. Keep in mind that the payment of claims under the Foreign Claims Act is based not on legal liability, but on the maintenance of good foreign relations.

the host nation is generally responsible for the security of persons in its territory, it is common for the U.S. to be responsible for security internal to the areas and facilities it uses. It may also be desirable to provide for the U.S. to have the right to take measures to protect its own personnel under certain circumstances. For example, Article III of the Korean SOFA provides that in the event of an emergency, the United States armed forces shall be authorized to take such measures in the vicinity of the facilities and areas as may be necessary to provide for their safeguarding and control. This may include a provision allowing military police the authority to apprehend U.S. personnel off the installation. The relative responsibilities of host nation and U.S. commanders is a sort of "sliding scale;" forces deployed for combat operations should expect little security from the receiving state.

Entry/Exit Requirements. Passports and visas are the normal procedures for identifying nationality and verifying that presence in the receiving state is authorized. But the issuance of passports to large numbers of military personnel is expensive and impractical, and—in an emergency—the issuance of visas unacceptably slow. Even in peacetime, the time it takes to process visa requests impacts significantly on operational flexibility. As a result, most SOFAs provide that U.S. personnel may enter and exit the territory of the receiving state on their military identification cards and orders.

Customs and Taxes. While U.S. Forces clearly should pay for goods and services requested and received, sovereigns do not generally tax other sovereigns. As a result, U.S. forces should be exempted from the payment of host nation customs and taxes on goods and services imported into or acquired in the territory of the receiving state for official use.

Contracting. Specific authority for U.S. forces to contract on the local economy for procurement of supplies and services not available from the host nation should be included in the SOFA. As noted above, provision should always be made to exempt goods and services brought into or acquired in the host country from import duties, taxes and other fees.

Vehicle Registration/Insurance/Drivers' Licenses. The Receiving State may attempt to require that U.S. vehicles be covered by third party liability insurance and that U.S. drivers be licensed under local law. These efforts should be resisted, and provisions specifically exempting U.S. forces from these requirements should be included in the SOFA or exercise agreement.

The U.S. Government is "self-insured." That is, the USG bears the financial burden of risks of claims for damages, and the Foreign Claims Act provides specific authority for the payment of claims. As a result, negotiation of any agreement should emphasize that official vehicles need not be insured.

Official vehicles may be marked for identification purposes, if necessary, but local registration should not be required by the receiving state. In many countries, vehicle registration is expensive. SOFAs frequently provide for POVs to be registered with receiving state authorities upon payment of only nominal fees to cover the actual costs of administration.

A provision for U.S. personnel to drive official vehicles with official drivers' licenses expedites the conduct of official business. It is also helpful if the Receiving State will honor the U.S. drivers' licenses of U.S. personnel or, in the alternative, issue licenses on the basis of possession of a valid stateside license without requiring additional examination.

8. Communications Support. When U.S. forces deploy, commanders rely heavily upon communications to exercise command and control. Absent an agreement to the contrary, the commander's use of frequencies within the electro-magnetic spectrum is governed by host nation law. This includes not only tactical communications, but commercial radio and television airwaves. This can greatly impact operations and should be addressed early in the planning process. While the commander prefers unencumbered use of the entire electro-magnetic spectrum—as was granted in the Dayton Peace Agreement to IFOR—one should not expect such acquiescence in future operations. Early and close coordination between U.S. and host nation communications assets should be the norm.

Logistics Agreements

Pre-positioning of Material. If U.S. equipment or material is to be pre-positioned in a foreign country, an international agreement should contain the following provisions:

-- Host nation permission for the U.S. to store stocks there.

-- Unimpeded U.S. access to those stocks.

-- Right of removal, without restriction on subsequent use.

-- Adequate security for the stocks.

-- Host nation must promise not to convert the stocks to its own use, nor to allow any third party to do so. (Legal title remains vested in the U.S.).

-- Appropriate privileges and immunities (status) for U.S. personnel associated with storage, maintenance or removal of the stocks.

In some cases, the DoD General Counsel has allowed some leeway in negotiating pre-positioning agreements, provided host government permission for U.S. storage in its territory and unequivocal acknowledgment of U.S. right of removal are explicit. "Legal title" need not be addressed per se, if it is clear the host government has no ownership rights in the stocks—only custodial interests—and that pre-positioned stock is solely for U.S. use. "Access" to the pre-positioned stocks need not be addressed explicitly, unless U.S. access is necessary to safeguard them. There can be no express restrictions on U.S. use. Prior "consultation" for U.S. removal of pre-positioned stocks is not favored, and prior "approval" is not acceptable. "Conversion" need not be specifically addressed, if it is clear that the prepositioned stock's sole purpose is to meet U.S. requirements. "Security" must be specifically addressed only when stores are at risk, due to their value. "Privileges and immunities" are required only when it is necessary for U.S. personnel to spend significant amounts of time in the host country to administer, maintain, guard or remove the stocks.

Host Nation Support. When a unit deploys overseas, some of its logistical requirements may be provided by the host nation. If so, it is desirable to have an international agreement specifying the material the host nation will provide and on what conditions, such as whether it is provided on a reimbursable basis.

Acquisitions and Cross-Servicing Agreements (ACSA). Subchapter 138 of Title 10, U.S.C., also provides authority for government-to-government acquisitions and for cross-servicing agreements for mutual logistics support. Under 10 U.S.C. § 2342, U.S. Forces and those of an eligible country[3] may provide logistics support, supplies and services on a reciprocal basis. The primary benefit of cross-servicing is that such support, supplies and services may be reimbursed through replacement in kind; trade of support, supplies or services of equal value; or cash. In addition, ACSA allows the deletion of several common contractual paragraphs required by the FAR but frequently objectionable to other sovereigns.[4]

For NATO, there is an aggregate ceiling of $200 million per year on the total amount of liabilities the U.S. may accrue under this subchapter, except during a period of active hostilities. The limit is $60 million per year for non-NATO countries. The amount of acquisitions and cross-servicing a component may conduct each year is allocated by the cognizant Combatant Commander.[5]

There are some restrictions on ACSAs. For example, they cannot be used as a substitute for normal sources of supply, nor as a substitute for foreign military sales procedures. "Major end items" may not be transferred under a

[3] Eligible countries include all NATO countries, plus non-NATO countries designated by SECDEF. Criteria for eligibility include: defense alliance with the U.S.; stationing or homeporting of U.S. Forces; pre-positioning of U.S. stocks; or hosting exercises or staging U.S. military operations. A list of ACSAs can be found on CLAMO's web site.

[4] *See* 10 U.S.C. § 2343.

[5] *See* 10 U.S.C. § 2347.

cross-servicing agreement. For general guidance, see DoD Directive 2010.9, Mutual Logistic Support between the United States and Governments of Eligible Countries and NATO Subsidiary Bodies.

Cryptologic Support. 10 U.S.C. § 421 authorizes SECDEF to use funds appropriated for intelligence and communications purposes to pay the expenses of arrangements with foreign countries for cryptologic support. This authority has been frequently used as the basis for agreements to loan communications security (COMSEC) equipment, such as message processors or secure telephones, to allied forces. Equipment of this type raises obvious technology transfer issues, and among the key provisions of any COMSEC agreement is the assurance that the receiving state's forces will not tamper with the equipment in an effort to retro-engineer its technology. See CJCSI 6510.01, *Joint and Combined Communications Security*, for guidance.

The U.S. as a Receiving State.

In the past, the focus of the Status of Forces was on U.S. service members deployed to other countries. However, in the post-Cold War era that is no longer exclusively the case. Foreign forces come to the U.S. for training on a routine basis. In fact, some NATO nations have units permanently stationed in the U.S.[6] The status of these foreign armed forces personnel depends on what nation's soldiers are conducting training in the U.S. Almost all status of forces agreements entered into by the U.S. have been non-reciprocal in nature. For example, the Korean SOFA only applies to U.S. armed forces in the Republic of Korea. Therefore, exclusive jurisdiction would rest with the U.S. The second situation is where the U.S. has entered into a Status of Forces Agreement that is reciprocal. The NATO SOFA and the PFP SOFA are such agreements. With nations party to the NATO SOFA and Partnership for Peace SOFA, the jurisdictional methodology is same as when the U.S. is sending forces, only the roles are reversed.

There are a number of issues to be addressed in this area. The first arises based on our federal system. If the international agreement under which the foreign forces are seeking protection is a treaty, it is the supreme law of the land, and is binding on both the federal and state jurisdictions. International agreements which are not treaties (i.e., executive agreements) do not have that status. Although these are binding on the federal government, they are not binding on the states. Therefore, a state prosecutor would be totally free to charge a visiting serviceman for a crime under state law, regardless of the provisions of the international agreement. Often such a prosecutor will be willing to defer prosecution in the national interest, but it may be a matter for delicate negotiation, and the judge advocate will take a leading part. Other issues arise from the foreign force imposing discipline on members of their force within the United States. Just as the U.S. conducts courts-martial in Germany, Germany may wish to do the same in the United States. DoDD 5525.3 and Service implementations address some of these issues.

[6] For example, at Holliman Air Force Base, there is a German Tornado Fighter Squadron permanently assigned there with talk of adding an additional squadron. Fort Bliss, Texas is home to a substantial German Air Defense training detachment.